92-1622 (D)
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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

IRENE M. IBARRA, in her official capacity as the Executive Director of the Colorado Department of Social Services; HENRY SOLANO, in his official capacity as the Executive Director of the Colorado Department of Institutions; ROBERT BAUSERMAN; ROBBIE L. BEAN; SUSANNE D. DOSH; DENNIS FISHER; MARY KYER; PEGGY STOKSTAD; JOHN P. STONE and RICHARD F. WALKER in their official capacities as members of the Colorado Board of Social Services,
Petitioners,
vs.
DUC VAN LE, on behalf of himself and the class of persons similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the Colorado Supreme Court
Case No. 91SC189

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a State may provide home and community-based services to elderly, blind and physically disabled medicaid recipients and not to mentally ill medicaid recipients without violating § 504 of the Rehabilitation Act of 1973 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the mentally ill are a "suspect class" for the purpose of analyzing claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the right to receive services to avoid institutionalization is a "fundamental right" for the purpose of analyzing claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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No.

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DUC VAN LE, on behalf of himself and the class of persons similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI
On Certiorari to the Colorado Supreme Court
Case No. 91SC189

The petitioners named above respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado entered in the above-entitled proceeding on December 14, 1992.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Colorado are

not published, and are reprinted in the appendix hereto, pp. B-1 and C-1.

The decision and order of the District Court of the City and County of Denver has not been published, and it is reprinted in the appendix hereto, p. A-1.

JURISDICTION

The opinion of the Colorado Supreme Court was delivered on December 14, 1992 and a timely petition for rehearing was denied on January 11, 1993.

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall ... deny to any person within its jurisdiction equal protection of the laws.

42 U.S.C. § 1396n(c) (1988 & 1990 Supp.) provides in relevant part:

> (1) The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home or

community-based services....

(2) A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that

....

(D) under such waiver the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals does not exceed 100 percent of the average per capita expenditure that the State reasonably estimates would have been made in that fiscal year for expenditures under the State plan for such individuals if the waiver had not been granted

....

(7)(A) In making estimates under paragraph (2)(D) in the case of a waiver that applies only to individuals with a particular illness or condition ... the State may determine the average per capita expenditure that would have been made in a fiscal year for those individuals under the State plan separately from the expenditures for other individuals....

42 C.F.R. § 441.301 (1992) provides in relevant part:

> (b) If the agency furnishes home and community-based services ... under a waiver request granted under this subpart, the waiver must
>
> ....
>
> (6) Be limited to one of the following target groups or any subgroup thereof that the State may define:
>
> (i) Aged or disabled, or both.
>
> (ii) Mentally retarded or developmentally disabled, or both.
>
> (iii) Mentally ill.

29 U.S.C. § 794 (1988), popularly known as § 504 of the Rehabilitation Act of 1973, provides in relevant part:

> (a) No otherwise qualified individual with handicaps in the United States ... shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving Federal financial assistance ....

STATEMENT OF THE CASE

Petitioners are officials of the State of Colorado who administer the medical assistance program under Title XIX of the Social Security Act and the Colorado Medical Assistance Act, §§ 26-4-101 to

26-4-661, C.R.S. (1992 Supp.), popularly known as "medicaid." Under medicaid, Colorado and the federal government pay for the medical care provided to poor, disabled and otherwise needy individuals. In order to qualify for matching federal funds, Colorado must pay for certain kinds of medical care and cannot pay for other kinds of care.

Among the services that Colorado must pay for are services provided by a nursing home. 42 U.S.C. §§ 1396a(a)(10)(A) and 1396d(a)(4)(A). Among the kinds of services that Colorado cannot pay for are services provided by an institution for mental diseases. *Connecticut Department of Income Maintenance v. Heckler*, 471 U.S. 524, 533 n.24 (1985) and accompanying text. This case involves a third kind of services: services that are neither required nor prohibited.

Pursuant to 42 U.S.C. § 1396n(c), a State may ask the federal government to waive certain requirements of the medicaid program in order to provide home and community-based services ("HCBS"). These services are provided to individuals who would otherwise require care in an institution, such as a nursing home. The cost of these services, however, must be less than medicaid would have paid for institutional services. HCBS can include services such as assistance with cooking, shopping, house cleaning, bathing and eating.

Pursuant to 42 U.S.C. § 1396n(c)(7)(A), a State may request a waiver limited to "individuals with a particular illness or condition ..." Indeed, federal regulations require that a waiver request be limited to one of three target groups: the physically disabled and elderly, the developmentally disabled, and the mentally ill. 42 C.F.R. § 441.301(b)(6) (1992). In 1982, Colorado obtained three different waivers to serve the three target groups. The waivers to serve the physically disabled and elderly and the developmentally disabled have operated continuously to the present, but Colorado's request to renew the waiver to serve the mentally ill was denied in

1985 and Colorado has not provided HCBS to mentally ill clients since that time.

Colorado is not unique in this regard. Several States have waivers to provide HCBS to physically disabled clients, but no State currently has a waiver to provide HCBS to mentally ill adults.[1] In large part, this is due to the difficulty of assuring that the cost of HCBS is less than the cost of institutional care. Inasmuch as medicaid does not pay for services provided by an institution for mental disease, clients who would otherwise receive services in an institution for mental disease are not appropriate for HCBS.

Colorado provides a number of non-institutional services for its mentally ill residents. These services include services under medicaid (such as clinic services and rehabilitation options) and services provided with only state funds (such as adult foster, home care allowance and community mental health centers). Respondent, nevertheless, brought an action alleging that providing HCBS to the elderly and physically disabled while denying HCBS to the mentally ill violated federal law.

The trial court entered judgment in favor of respondent. Specifically the trial court held that respondent and the class he represented were "otherwise qualified" to receive HCBS and that the failure to provide them with HCBS violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988). The trial court further held that the failure to provide HCBS to the mentally ill violated the Equal Protection Clause. According to the trial court, the mentally ill were a "suspect class" and HCBS was a "fundamental

---

[1] According to CCH Medicare & Medicaid Guide, ¶ 14,625, pp. 6340-50 (8/92), there are approximately 148 waivers in effect in 48 states. The waivers are targeted to the developmentally disabled (68), elderly, blind and physically disabled (57), AIDS (13) and a number of narrower target groups defined by illness or condition. None of the waivers are targeted to mentally ill adults.

right" so that the failure to provide HCBS should be strictly scrutinized. Moreover, the trial court concluded that Colorado did not have even a rational basis for providing HCBS to the physically disabled but providing different non-institutional services to the mentally ill.

Petitioners appealed this decision to the Colorado Court of Appeals. Thereafter, the Colorado Supreme Court granted a pre-judgment writ of certiorari. The Colorado Supreme Court then reversed the trial court by a vote of five to two.

The Colorado Supreme Court held that the mentally ill were not a suspect class and that HCBS was not a fundamental right. The court also held that the slight chance of obtaining a waiver to serve the mentally ill and the cost of pursuing such a waiver provided a rational basis for Colorado's decision to offer different non-institutional services to the mentally ill.

After this decision, the Colorado Supreme Court granted respondent's petition for rehearing. On rehearing, one justice recused himself and the remaining justices divided equally. This equally divided vote had the effect of affirming the trial court's decision.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW MISCONSTRUED THE REQUIREMENTS OF § 504 TO MEAN THAT BENEFITS GIVEN TO ONE GROUP OF HANDICAPPED INDIVIDUALS MUST ALSO BE GIVEN TO ALL OTHER HANDICAPPED INDIVIDUALS, DESPITE UNANIMOUS PRECEDENT TO THE CONTRARY.

The court below held that a State may not target benefits to one group of handicapped individuals and deny them to others without violating § 504. The courts, Congress and administrative agencies are unanimous in rejecting this position, and the decision hampers States in their efforts to provide benefits to handicapped individuals.

In *Traynor v. Turnage*, 485 U.S. 535, 549 (1988), this Court said, "There is nothing in the Rehabilitation Act that requires that any benefits extended to one category of handicapped persons be extended to all other categories of handicapped persons." This doctrine has been applied by every other court facing an issue similar to the one presented in this case. For example, in *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343 (10th Cir. 1987), the court held that a sponsor did not violate § 504 by offering subsidized housing to the elderly and mobility impaired but not to the mentally ill. *Accord Brecker v. Queens B'nai B'rith Housing Development Fund*, 607 F. Supp. 428 (E.D.N.Y. 1985), *aff'd*, 798 F.2d 52 (2d Cir. 1986). In *Bernard B. v. Blue Cross Shield of Greater New York*, 528 F. Supp. 125 (S.D.N.Y. 1981), *aff'd*, 679 F.2d 7 (2d Cir. 1982), the court held that an insurance company did not violate § 504 by paying for inpatient care but not for psychiatric inpatient care. Similarly, the court in *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979) held that a State did not violate § 504 by providing unlimited general hospital care but only limited care in a mental institution. In *Duquette v. Dupuis*, 582 F. Supp. 1365 (D. N.H. 1984), the court

held that a State did not violate § 504 by providing medical benefits to blind children while denying the benefits to all other handicapped children.

These decisions are consistent with the actions of Congress to target certain benefits to particular groups of handicapped individuals. For example, in the Rehabilitation Act itself, Congress created programs benefitting certain handicapped individuals while excluding others. Pub. L. No. 93-112, 87 Stat. 355, § 305, *reprinted in* 1973 U.S. Code Cong. & Admin. News 409, 441, established a National Center for Deaf-Blind Youths and Adults. The 1986 amendments to the Rehabilitation Act renewed this program. Pub. L. No. 99-506, § 901, 100 Stat. 1807, 1840 "Reauthorization of Helen Keller National Center Act." In the recently enacted Housing and Community Development Act of 1992, Pub. L. 102-550, 106 Stat. 3813, § 622 Congress expressly allowed public housing agencies to designate projects for the elderly and exclude the disabled. The Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (1988), gives blind individuals a preference in operating businesses within public buildings even though other handicapped individuals could also benefit from such a preference.

Administrative regulations implementing § 504 reinforce the view that benefits can be provided to some handicapped individuals without providing them to all handicapped individuals. 45 C.F.R. § 84.4 (1992) provides that "... the exclusion of a specific class of handicapped individuals from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited ...." Similarly, regulations implementing the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12213 (1990), provide that, "nothing ... prohibits a public entity from providing benefits ... to a particular class of individuals with disabilities ...." 28 C.F.R. § 35.130(c) (1992). The regulatory comments on this provision explain that, "... State and local governments may provide special benefits ... limited to ... a particular class of individuals with disabilities without thereby incurring additional obligations to ... other

classes of individuals with disabilities." 56 Fed. Reg. 35705 (July 26, 1991).

In this case, federal regulations require waivers be limited to one of three defined target groups, and specifies that the physically disabled and the mentally are in different target groups. The statute authorizing the waivers expressly anticipates that waivers may be limited to "individuals with a particular illness or condition ...." 42 U.S.C. § 1396n(c)(7)(A). The legislative history underlying this section says without ambiguity that, "States are allowed to target their waivers to groups of individuals at risk of hospital care, as defined by illness or diagnosis (e.g., AIDS of {sic} AIDS related condition), or by condition (e.g., chronic mental illness, ventilator dependency)." H. Conf. Rep. No. 99-1012, *reprinted in* 1986 U.S. Code Cong. & Admin. News 4046.

Despite this wealth of authority from the courts, Congress and administrative agencies permitting States to target benefits to one group of handicapped individuals while excluding others, the court below held that Colorado could not limit its HCBS program to the physically disabled. Petitioners believe that this is a question of first impression in the state and federal courts. The decision is not only novel, it casts doubt on the legality of all 148 HCBS waivers operating in 48 States.

Moreover, the claim in this case is very odd. In the typical § 504 case, the plaintiff claims that he should receive some benefit *despite* his handicap. In this case, respondent claims he is entitled to a benefit *because* of his handicap. In short, he is not using § 504 as a shield to protect himself from discrimination, but as a sword to carve out a place for himself in a benefit program intended for entirely different group of handicapped individuals.

The decision substantially misconstrues the requirements of § 504, and effectively guts the usefulness of HCBS waivers. Under the decision of the court below, States can longer target benefits to

particular groups as Congress intended but must choose between providing HCBS to all needy groups or to none. Accordingly, HCBS waivers will be inflexible and unwieldy and States will be less likely to utilize them. In the end, the decision of the court below will only result in fewer services for the disabled because States will have to weigh the risk of litigation and coverage of unintended groups any time it considers a program to serve any portion of the disabled community.

II. THE COURT BELOW, CONTRARY TO EVERY REPORTED DECISION ON THE ISSUE, HELD THAT THE MENTALLY ILL WERE A SUSPECT CLASS, SO THAT LEGISLATIVE ACTIONS REGARDING THE MENTALLY ILL MUST BE SUBJECTED TO STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

The court departed from well established judicial precedent by holding that the mentally ill are a suspect class. All other decisions on the issue have held that the mentally ill are not a suspect class. *Douglas v. Hugh A. Stallings, M.D. Inc.*, 870 F.2d 1242 (7th Cir. 1989); *United States ex rel. Weismuller v. Lane*, 815 F.2d 1106, 1110 n.7 (7th Cir. 1987); *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343 (10th Cir. 1987); *Cospito v. Heckler*, 747 F.2d 72, 82 (3d Cir. 1984), *cert. denied*, 471 U.S. 1311 (1985); *Benham v. Edwards*, 678 F.2d 511, 515 n.9 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1222 (1983). On a closely related issue, this Court has held that mentally retarded individuals are not a suspect class. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

It is clear that the decision below is without support in any reported decision and that it imposes a substantial burden on all state

and local governments that seeks to extend a benefit to any needy group without extending the same benefit to the mentally ill.

III. THE COURT BELOW CREATED A SIGNIFICANT NEW CONSTITUTIONAL RIGHT, BECAUSE IT HELD THAT INDIVIDUALS ARE ENTITLED TO SERVICES TO PREVENT INSTITUTIONALIZATION.

The court below held that individuals have a right to be free of undue bodily restraint and that Colorado infringed on this right by failing to provide HCBS to mentally ill persons. There is no support for this decision in the law, and it creates an unlimited liability for the States to provide services to their citizens.

In *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982), this Court said, "As a general matter, a State is under no constitutional duty to provide substantive services for those within its borders." In this case, the court below held that the right to receive HCBS was a fundamental right, because it implicated liberty interests in freedom from bodily restraint. This holding dramatically expands the services a State must offer under the Constitution. In virtually all cases in which a person's liberty is restrained, one could credibly argue that the restraint would not be necessary if the State had only provided the appropriate services. Thus, there would be a fundamental right to marriage counseling to prevent incarceration for domestic violence, a fundamental right to treatment for substance abuse to avoid incarceration or hospitalization for drug related problems, and a fundamental right to family therapy to avoid placing children in foster care. Carried to its logical conclusion, the holding of the court below would mean that the States must provide every conceivable service that might prevent any loss of liberty.

Petitioners believe that the question of whether HCBS is a

fundamental right is one of first impression in the state and federal courts. Inasmuch as 48 States offer HCBS to their citizens, this is an issue of great public importance that should be addressed by this Court.

IV. THERE IS A RATIONAL BASIS FOR COLORADO'S DECISION NOT TO OFFER HCBS TO THE MENTALLY ILL.

In *Schweiker v. Hogan*, 457 U.S. 569, 590 (1982), this Court said:

> In establishing public assistance programs, Congress has often determined that the federal government cannot finance a program that provides meaningful benefits in equal measure to everyone. Both state and federal funds for such assistance are limited.

The same is true here. Funds to provide medical assistance are not limitless, and benefits cannot be given to everyone in equal measure. This is why HCBS waivers can be limited to "... individuals with a particular illness or condition ...." 42 U.S.C. § 1396n(c)(7). In this way, States can control their expenditures for medical assistance and target benefits to particular groups.

In *Beckwith v. Kizer*, 912 F.2d 1139 (9th Cir. 1990), the Ninth Circuit was presented with a challenge to an HCBS waiver that served persons that had been hospitalized but did not serve persons with identical physical conditions that had not been hospitalized. The court upheld the waiver against an equal protection challenge, and said:

> Definition of any waiver class necessarily involves difficult policy

> judgments concerning where services would most efficiently be used. We lack the qualifications or the authority to pass upon the fiscal responsibility of California's waiver program in the manner plaintiffs request .... We cannot say that this decision is irrational. The statute is intended to alleviate the problem of unnecessary institutionalization, but it does not purport to solve it altogether.

In this case, Colorado was faced with a situation where its request for a waiver to serve the mentally ill had been denied by the federal government, no other State currently has such a waiver, and there are a number of other non-institutional services that it could offer to its mentally citizens. In such a case, it cannot be said that Colorado's decision to pursue other options than HCBS for the mentally ill was irrational.

CONCLUSION

Based on the above points and authorities, the petition for a writ of certiorari should be granted.

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APPENDIX A

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
Case No. 88 CV 22641, Courtroom 20

DECISION AND ORDER

DUC VAN LE, on behalf of himself and the class of persons similarly situated,
Plaintiffs,
v.
IRENE M. IBARRA, in her official capacity as Director of the COLORADO DEPARTMENT OF SOCIAL SERVICES; HENRY SOLANO, in his official capacity as Director of the COLORADO DEPARTMENT OF INSTITUTIONS; ROBERT BAUSERMAN; ROBBIE L. BEAN, SUZANNE D. DOSH; DENNIS FISHER; MARY KYER; PEGGY STOKSTAD; JOHN P. STONE; RICHARD F. WALKER, in their official capacity as members of the COLORADO BOARD OF SOCIAL SERVICES,
Defendants.

This is an action brought by plaintiff Duc Van Le individually, and on behalf of all others similarly situated, against Irene M. Ibarra, in her official capacity as Director of the Colorado Department of Social Services; Robert Bauserman, Robbie L. Bean, Suzanne D. Dosh, Dennis Fisher, Mary Kyer, Peggy Stokstad, John P. Stone, and Richard F. Walker, in their official capacity as members of the Colorado Board of Social Services; and Henry Solano, in his official capacity as Director of the Colorado Department of Institutions.

The Court has previously determined that this action should be maintained as a class action pursuant to Rule 26, subsections (b)(1) and (b)(2) of C.R.C.P. The class is defined as follows:

> Low income mentally ill residents of Colorado who, because of their mental illness, qualify for skilled or intermediate care under Title XIX of the Social Security Act, but who have been and are being deprived by the State of Colorado of home and community based services under Title XIX of the Social Security Act, solely on the basis of their mental illness, although such services are provided to physically disabled adults, and who claim that this deprivation violates their rights under the Social Security Act, the Rehabilitation Act of 1973 and the Fourteenth Amendment of the United States Constitution.

Plaintiff seeks to enjoin defendants, their agents and employees, from denying members of the class, as defined above, access to home and community based services (HCBS) under the State's HCBS waiver program, solely on the basis of the nature of their disability.

Plaintiff contends that state defendants' unequal and discriminatory treatment of the mentally ill in allocating HCBS benefits is contrary to Section 1915(c) of the Social Security Act [42 U.S.C. § 1396n(c)], and constitutes a violation of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794]. Plaintiff also claims that the classification of persons whose primary diagnosis is mental illness, so as to exclude such persons from receiving needed HCBS benefits, violates equal protection under the Fourteenth Amendment to the United States Constitution.

The Court, after reviewing all of the evidence in this case, and in consideration of the testimony of the witnesses called, documentary evidence submitted, and the briefs and arguments of counsel, does

enter these findings of fact and conclusions of law.

FINDINGS OF FACT

The parties to this matter have submitted Stipulated Facts, which this Court accepts as true and incorporated herein.

In addition to the stipulated facts, the Court has heard testimony from Catherine Pring, the Director of Adult Services for Denver County Department of Social Services; Rose Kotlar, Director of Outpatient Services for the Mental Health Corporation of Denver; Rev. Wade Blank, Director of the Atlantis Community; and Bruce Berger, the Assistant Director of the Colorado Division of Mental Health. Based upon the testimony of these witnesses, the Court makes the following additional findings of fact:

1. Personal care services, homemaker services, medication monitoring in the home, and non-medical transportation, which are services currently provided under the HCBS Program for the elderly, blind and physically disabled, are services which are necessary to maintain plaintiff and class members in stable condition in the community, and to avoid institutionalization of such persons in hospitals and nursing homes.

2. No public or private agency currently has a program to provide these essential services to plaintiff and class members, although such services are provided by the Department of Social Services to elderly, blind and physically disabled adults whose incomes and medical needs are virtually identical with those of plaintiff and class members.

3. Without these home and community based services, plaintiff and class members will continue to experience the revolving door syndrome of hospitalization, nursing home placement, placement in the community, de-stabilization and re-hospitalization. Thus, the availability of HCBS is an essential ingredient of normal living

patterns for a substantial number of persons who are mentally ill. The failure to provide such services operates to exclude persons who are mentally ill from living in the community, and to return them into more restrictive environments.

4. The mental health services currently provided through the Mental Health Corporation of Denver (MHCD) and other community mental health centers are not sufficient by themselves to avoid the revolving door of re-institutionalization of chronically mentally ill persons. As an example, there is currently a 200-person waiting list for case management services in the MHCD alone. Even under optimal conditions, case managers, with the existing resources, could only spend, on average, slightly more than one hour per week with chronically mentally ill clients. Such case management services, alone, cannot provide the community supports necessary to avoid re-institutionalization of plaintiff and other mentally ill persons class members.

5. Although the State claims that the federal government will not fund a HCBS waiver for mentally ill persons, the evidence of record shows that the State in the last five years has not applied for such a waiver, has not requested in writing any assistance from the federal government to develop a waiver which would be acceptable under the existing regulations, and has not made any attempts to correct its rejected 1985 waiver application or to challenge the rejection of that waiver application in 1985.

6. The cost burden to the State of providing HCBS program services to the mentally ill is insignificant in light of the benefits to plaintiff and class members, and the federal government's contribution of between 50% and 75% of the cost. The evidence indicates that provision of such services would prevent unnecessary hospitalizations at a cost of $400.00 per day, as compared to the $46.00 per day average cost of HCBS services.

7. According to the testimony there are currently

approximately 300 persons in nursing homes in the Denver metropolitan area alone who have been designated as mentally ill.

8. Many of these persons could live in the community if community supports provided through the HCBS program were made available to them.

9. In addition, there are substantial numbers of class members who are currently residing in the community, either in substandard boarding homes or homeless shelters, who would benefit from home and community based services identical to those that are currently provided to the elderly, blind and physically disabled.

10. Despite these facts, the State of Colorado, through the Department of Institutions and the Department of Social Services, has simply failed to exercise reasonable diligence to seek out federal financial assistance, which is currently available, to provide these home and community based services to plaintiff and class members.

11. As plaintiff and class members meet all of the medical and financial qualifications for the Home and Community Based Services Program currently operated by the State, other than the fact that they are mentally ill, they are otherwise qualified handicapped persons under Section 504 of the Rehabilitation Act of 1973.

12. The evidence of record establishes that plaintiff and class members require the very same home and community based services, which the State currently makes available to the elderly, blind and physically disabled, and that plaintiff and class members are deprived of these services solely by reason of the nature of their disability.

13. The State is currently underspending its authorized funding for home and community based services for the elderly, blind and physically disabled; therefore, there is sufficient funding within the HCBS Program to accommodate the provision of home and community based services to plaintiff and class members.

CONCLUSIONS OF LAW

The Court, upon consideration of its Findings of Fact, has determined that the defendants have violated the federal statutory and constitutional rights of plaintiff and class members.

1. Section 1915(c) of the Social Security Act, by its clear language, establishes the HCBS waiver program for:

> individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or skilled nursing facility or intermediate care facility....

See 42 U.S.C. § 1396n(c)(1).

2. This statute does not limit participation in the HCBS waiver program to any specific category of persons who would otherwise be institutionalized. Indeed, there is no provision in the statute which authorizes states to offer HCBS programs for the elderly, blind and physically disabled while discriminating against eligible mentally ill persons solely on the basis of the nature of their disability. To the contrary, the statute establishes a single, unified HCBS waiver program for all otherwise eligible persons who, without the provision of such services, would require hospitalization, or skilled or intermediate nursing home care.

3. Plaintiff and the class of persons he represents meet the above-quoted statutory definition; therefore, they cannot be excluded from receiving HCBS program services solely by reason of the nature of their disability.

4. Defendants' assertion that plaintiff would be ineligible for HCBS on the basis of the MINS criteria, which became effective July 2, 1989, is erroneous. The MINS criteria were not in effect at the time that plaintiff was denied services under the HCBS program.

5. Further, 10 C.C.R. 8.485.41(5)(a) specifically provides that:

> Individuals who are de-institutionalized from skilled nursing facilities and intermediate care facilities, and who continue to meet all other HCBS-EBD eligibility criteria shall be exempt from application of the HCBS-EBD admission criteria for determination of applicants most in need of services at the time of admission and upon all subsequent level of care reviews....

6. According to the stipulated facts, plaintiff was de-institutionalized from Sunshine Health Care Center, an intermediate care facility. Hence, the MINS criteria, even in their present form, would not affect the eligibility of plaintiff and class members who have been de-institutionalized from hospitals, skilled nursing facilities and intermediate care facilities.

7. Defendant Solano contends that he does not have the responsibility for providing community based services to mentally ill persons. The facts indicate otherwise. Stipulated fact number 23 explicitly states that:

> Defendant Henry Solano is the Director of the Colorado Department of Institutions (DOI). In his official capacity and in conjunction with the Department of Social Services, he has

been delegated certain responsibilities and authority to provide home and community based services for the mentally ill under C.R.S. § 26-4.5-204.

8. Further, prior to its repeal in May 1990, § 26-04.5-204, C.R.S. (1989 Repl. Vol.), stated that:

> The department of social services and the department of institutions shall:
>
> (a) Utilize any available federal, state, local, or private funds, including, but not limited to, medicaid funds available under Title XIX of the federal "Social Security Act", as amended, to carry out the purposes of this part 2; ...

9. Under part 2 of Title 26, article 4.5, the Colorado General Assembly established a program of home and community based services for the mentally ill. Subsection 26-4.5-209(1) states:

> A program to provide home and community-based services to those mentally ill persons in need of the level of care available in a nursing home is hereby established pursuant to the federal "Social Security Act", as amended. This program shall provide for the mental health, residential, and other needs of mentally ill persons so that those persons may avoid

institutionalization in nursing homes.

10. Under these statutory provisions, defendant Solano, and his department's prior directors, along with the current and former executive directors of the Department of Social Services, from July 1, 1982 to May 1990, were mandated to establish a home and community based services program for the mentally ill, using any available state, federal, local or private funds.

11. Defendants attempt to rationalize their failure to seek an HCBS waiver on behalf of plaintiff and class members, and thus the unequal treatment of them, on the following alleged grounds:

a. Mentally ill persons do not always need the same services and cannot be treated the same as physically disabled people;

b. The State should be able to provide services for which federal financial assistance is available, while not undertaking similar services in the absence of federal funding; and

c. The State should be able to determine the appropriate allocation of scarce resources for public welfare benefits.

12. The stipulated facts defeat the rationalizations proffered by state defendants.

13. State defendants have stipulated that the same HCBS services currently provided to the elderly, blind and physically disabled are "essential" and "would be of great benefit to Duc Van Le and the class of mentally ill persons he represents."

14. Exhibit 5 to the stipulated facts, a May 17, 1990 letter from the director of the Health Care Financing Administration (HCFA) to Congresswoman Patricia Schroeder, states that federal financial assistance is available for HCBS program services for the mentally ill just as it is available for HCBS program services for the

elderly, blind and physically disabled. This letter from HCFA also states that the Department of Health and Human Services "applies the *same standards* to waivers for the mentally ill as it does for all other requests for waivers." Therefore, federal funds are equally available for HCBS programs for the mentally ill as for HCBS programs for the elderly, blind and physically disabled.

15. In addition, state defendant have stipulated that the federal government would pay between 50% and 75% of the cost of HCBS program services.

16. There are no facts or evidence before the Court to support state defendants' contention that they should be able to provide HCBS program services to the elderly, blind and physically disabled while denying such services to mentally ill persons on alleged grounds of "scare public dollars." Indeed, the State has admitted that HCBS program services are essential to contain the more expensive costs of skilled and intermediate care. The evidence also shows that the State is underspending appropriated funds for the HCBS program.

In addition to the foregoing, Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794] states that:

> (a) No otherwise qualified individual with handicaps in the United States ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

The federal regulations implementing Section 504 of the Rehabilitation Act of 1973 specifically provide that:

> No qualified handicapped person shall,

> on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

45 C.F.R. 84.4(a).

The Section 504 implementing regulations further outline the types of discrimination prohibited by the statute. These include:

a. Deny[ing] a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

b. Afford[ing] a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

c. [Providing] a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

d. [Providing] different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

e. Otherwise limit[ing] a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service.

45 C.F.R. 84.4(b)(1).

The limited exception to the prohibition against such discriminatory actions is outlined in 45 C.F.R. 84.4(c):

> ... [T]he exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

This exception is inapplicable to this case. As Section 1915(c) of the Social Security Act does not limit participation to any specific class of handicapped persons, the exclusion under 45 C.F.R. 84.4(c) does not apply.

Although state defendants point to mental health services provided under the Colorado Care and Treatment of the Mentally Ill Act, these are the same "services" which the Colorado Supreme Court in *Goebel, et al. v. Department of Institutions, et al.*, 764 P.2d 785 (Colo. 1988) found to be so deficient that plaintiff's and class members' rights under the Act were and continue to be violated.

> There is no alternative state program which provides for Duc Van Le and the class of mentally ill persons he represents the same HCBS program services which are currently being provided to elderly, blind and physically disabled persons.

Under the State's administration of the HCBS program and other State programs, eligible elderly, blind and physically disabled persons receive homemaker services, personal care services, medication monitoring, assistance with cleaning and hygiene, and assistance with similar household tasks while similarly situated mentally ill persons are denied such services.

State defendants rely on *Knutzen v. Nelson*, 617 F. Supp. 977 (D. Colo. 1985), *aff'd* 815 F.2d 1343 (10th Cir. 1987), to justify their refusal to provide plaintiff and class members the same home and community based services the State, with federal financial assistance, provides to elderly, blind and physically disabled persons. The *Knutzen* case, however, dealt with Section 202 housing program benefits rather than HCBS waiver program benefits.

Further, the *Knutzen* court found that plaintiffs in that case had not established a prima facie case under Section 504 because they were not excluded solely on the basis of their handicap. In this case, however, state defendants have specifically stipulated that they are denying HCBS to plaintiff and class members solely on the basis of the nature of their handicap. Specifically, defendants have stipulated they [sic]:

> Even though Duc Van Le and the members of the plaintiff class meet all of the financial and medical screens for HBS services, they have been and will be denied these services solely on the basis that their primary diagnosis is mental illness.

Further, the Colorado Supreme Court's analysis of the applicability of Section 504 to mentally ill persons in *Goebel, et al. v. Colorado Department of Institutions, et al., supra*, supports plaintiff's Section 504 arguments here. In *Goebel*, the Supreme Court found that the trial court should not have dismissed the Section 504 claim of the mentally ill plaintiffs alleging that the Department of Institutions discriminated against mentally ill persons on the basis of the severity of their handicap. *Goebel, supra*, 764 P.2d at 803-807.

The *Goebel* court cited with approval a number of cases, including *Homeward Bound, Inc. v. Hissom Memorial Center*, No. 85-C-437-E (N.D. Oklahoma, July 24, 1987) [available on

WESTLAW, 1987 WL 27104], a case involving Oklahoma's refusal to apply for HCBS program services for the mentally retarded. The *Homeward Bound* court ruled that the State of Oklahoma's failure to seek HCBS program services under the federal waiver, which would prevent institutionalization of mentally retarded citizens, violated their rights under Section 504 as well as their right to equal protection under the United States Constitution.

The *Homeward Bound* court found that mentally retarded persons have a "right to effective and integrated services under Section 504." Analyzing the intent of Congress in enacting the Federal Rehabilitation Act of 1973, as reflected in the extensive legislative history of the Act, the *Homeward Bound* court ruled that "Section 504 prohibits unnecessarily segregated services for regarded persons."

The *Homeward Bound* court also found that the State had violated Section 504 by providing fewer services to severely retarded persons and retarded persons with other handicaps. Indeed, the court found that "federally assisted retardation services for severely retarded people and for retarded people with physical or behavior disabilities have been provided by [the state] only in segregated settings."

Finally, the *Homeward Bound* court found an "underdevelopment of a community service system" by a state which constituted "a continuation of the original and continuing discrimination practiced by the state against retarded people" and ruled that "the affirmative development of community services is necessary to remedy this effect." The court relied on and upheld the HHS' regulatory construction of Section 504, which requires the taking of "appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices." *See* 45 C.F.R. 84.6.

These findings of the *Homeward Bound* court with respect to mentally retarded persons are equally applicable here with respect to

mentally ill persons. The State's current administration of services clearly segregate mentally ill persons from other handicapped persons. By failing to provide HCBS program services to mentally ill persons, the State has underdeveloped a community based services system for those suffering from mental illness, which perpetrates past discrimination against such persons. Such discrimination clearly violates plaintiff's and class members' rights under Section 504.

Finally, in determining whether the requirements of Section 504 are met, the U.S. Supreme Court has mandated that courts must balance "the statutory rights of the handicapped to be integrated into society and the legitimate interest of federal grantees in preserving the integrity of their programs." *Alexander v. Choate*, 469 U.S. 287, 300 (1985). This balancing test requires:

> That an otherwise handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies other qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodation in the grantee's program or benefit may have to be made.

Id. at 301.

In this case, the State has simply failed to provide mentally ill persons access to home and community based services. Plaintiff and class members seek no more than the same access to HCBS program services as is provided to the elderly, blind and physically handicapped.

The defendants [sic] further contend that the State's failure to

provide HCBS benefits to mentally ill persons solely on the basis of the nature of their handicap constitutes a violation of equal protection.

The Fourteenth Amendment to the United Constitution states that:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In 1982, the United States Supreme Court in *Plyler v. Doe*, 457 U.S. 202, 216 (1982), stated unequivocally that "[t]he Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike." Three years later in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985), the Court ruled that:

> When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

See Zobel v. Williams, 457 U.S. 55, 60 (1982).

When a governmental classification operates to the peculiar disadvantage of a "suspect" class or interferes with the exercise of a "fundamental" right or interest, strict scrutiny of the classification is required. To pass muster under the strict scrutiny test, such a classification must further a compelling governmental interest which cannot be served by an alternative means less burdensome to the suspect class or [sic] fundamental right or interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

A suspect class has generally been described as a "discrete and insular" minority. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). These are classes which have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

Rights are fundamental if their source, explicitly or implicitly, is the Constitution. *Plyler, supra*, 457 U.S. at 217 n. 15. *See also Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1015 n. 7 (Colo. 1982) ("fundamental rights are essentially those rights having a value essential to individual liberty in our society"). Among the rights which are considered fundamental, "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). The *Youngberg* court indicated that reasonable "habilitation" services, which are needed to assure freedom from undue restraint of persons who are mentally disabled, may be found to be fundamental in an appropriate case.

When there is no suspect class or fundamental right involved, there still must be some rational basis for the governmental classification and disparate treatment. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973).

While the United States Supreme Court has generally applied a rational basis test rather than a strict scrutiny test for equal protection claims the Court has never been confronted with an equal protection claim in which mentally ill persons are denied benefits necessary to avoid institutionalization, i.e., the loss or deprivation of a liberty interest, on the basis of their mental handicap.

Indeed, the United States Supreme Court in *Schweiker v. Wilson*, 450 U.S. 221, 230-31 n. 15 (1981), reserved decision on the question of what standard of review applies to legislation classifying the mentally ill as a distinct group.

The United States Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), overturned a discriminatory zoning ordinance affecting mentally retarded persons by applying a rational basis test.

Physically disabled persons and mentally ill persons are similarly situated with respect to the purposes of the Section 1915(c) waiver statute.

The mentally ill are a suspect class for equal protection purposes.

Plaintiff's and class members' interest in living in a community setting, and being free from undue bodily restraint in institutional setting such as hospitals and nursing homes, is a fundamental liberty interest which is infringed by the State's failure to provide HCBS benefits to persons who are mentally ill.

On the basis of the stipulated facts and evidence presented, state defendants have shown no compelling governmental interest to support the unequal and discriminatory treatment of plaintiff and class members in this case.

Even assuming that the denial of HCBS benefits to mentally ill persons does not involve a suspect class or a fundamental right or interest, state defendants have not shown that such denial of HCBS benefits is rationally related to any legitimate governmental interest.

Therefore, the State's failure to provide HCBS benefits to mentally ill persons solely on the basis of the nature of their handicap, i.e. mental illness, constitutes a violation of equal

protection.

ORDER

IT IS THEREFORE ORDERED that plaintiff Duc Van Le and members of the class, as previously certified, are entitled to meaningful access to the same HCBS program services which are currently provided to elderly, blind and physically disabled persons.

IT IS FURTHER ORDERED that:

1. State defendants, their agents and employees are permanently enjoined from denying plaintiff and class members HCBS benefits solely on the basis that their primary diagnosis is mental illness.

2. So long as state defendants provide HCBS benefits to elderly, blind and physically disabled persons, they shall provide the same services for plaintiff and class members.

3. The parties shall submit recommendations to the Court within fifteen (15) days after the date of this Order regarding a feasible method for notifying class members of their right to apply or re-apply for HCBS benefits.

DONE AND SIGNED this _____ day of August, 1990, at Denver, Colorado.

BY THE COURT:

_____

Edward E. Carelli, Judge

APPENDIX B

SUPREME COURT OF COLORADO
Case No. 91SC189

April 20, 1992

DUC VAN LE, on behalf of himself and the class of persons similarly situated,

Petitioner,

v.

IRENE M. IBARRA, in her official capacity as the Executive Director of the COLORADO DEPARTMENT OF SOCIAL SERVICES; HENRY SOLANO, in his official capacity as Executive Director of the COLORADO DEPARTMENT OF INSTITUTIONS; ROBERT BAUSERMAN, ROBBIE L. BEAN, SUSANNE D. DOSH, DENNIS FISHER, MARY KYER, PEGGY STOKSTAD,
JOHN P. STONE, and RICHARD F. WALKER in their official capacities as members of the COLORADO BOARD OF SOCIAL SERVICES,

Respondents.

Certiorari to the Colorado Court of Appeals
Pursuant to C.A.R. 50

EN BANC

JUDGMENT REVERSED

In this class action, the trial court held that respondents, administrators of state social services programs, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), by failing to provide the petitioner, Duc Van Le, and the members of the class of low income mentally ill persons with the same Home and Community-Based Services (HCBS) program that is provided to elderly, blind, and disabled persons. The trial court ordered respondents to provide HCBS benefits to the class members. Respondents appealed the trial court judgment to the court of appeals. We accepted certiorari before judgment pursuant to

C.A.R. 50 and now reverse the judgment of the trial court.

Petitioner Duc Van Le is a low income mentally ill resident of Colorado who requires round-the-clock skilled nursing care. He lived in a nursing home for several years until it was determined that the nursing home environment was no longer conducive to his further improvement. Petitioner was then moved to an independent living facility, where he continued to receive supervision. In August 1988, he applied for Medicaid reimbursement for the services he was receiving at the facility. Respondent Colorado Department of Social Services determined that petitioner qualified financially for HCBS, but denied his application because he is mentally ill. Petitioner commenced this class action in November 1988 to obtain HCBS benefits for himself and for a class of similarly situated "low income mentally ill residents of Colorado." The class certified by the trial court, pursuant to C.R.C.P. 23(b)(1) and (2), was:

> Low income mentally ill residents of Colorado who, because of their mental illness, qualify for skilled or intermediate care under Title XIX of the Social Security Act,[2] but who have been

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[2]Title XIX of the Social Security Act §§ 1901-1930, 42 U.S.C.A. §§ 1396-1396u (West 1992), is also known as "Medicaid." Section 1901 states that Title XIX was enacted:

> For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain

and are being deprived by the State of Colorado of home and community based services under Title XIX of the Social Security Act, solely on the basis of their mental illness, although such services are provided to physically disabled

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capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary [of Health and Human Services], State plans for medical assistance.

42 U.S.C. § 1396 (1988). The United States Supreme Court explained:

> Medicaid was established by Title XIX of the Social Security Act of 1965, 79 Stat. 343, as amended, 42 U.S.C. § 1396 *et seq.* Medicaid is a joint state-federal funding program for medical assistance in which the Federal Government approves a state plan for the funding of medical services for the needy and then subsidizes a significant portion of the financial obligations the State has agreed to assume. Once a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations. *Harris v. McRae,* 448 U.S. 297, 301 (1980).

Alexander v. Choate, 469 U.S. 287, 289 n.1 (1985); *see also Geriatrics, Inc. v. Colorado Dep't of Social Servs.*, 712 P.2d 1035, 1040 (Colo. App. 1985) (goal of Medicaid "is to provide services to program recipients to the same extent, or as nearly as possible, as those services are available to the general public").

> adults, and who claim that this deprivation violates their rights under the Social Security Act, the Rehabilitation Act of 1973 and the Fourteenth Amendment of the United States Constitution.

Duc Van Le v. Ibarra, No. 88CV22641, slip op. at 1-2 (Denver Dist. Ct. Aug. 23, 1990).

Respondents administer Colorado's HCBS programs and were sued in their official capacities as the directors of the Colorado Department of Social Services and the Colorado Department of Institutions, and as members of the Colorado Board of Social Services. From 1982 through 1985, respondents administered programs that provided HCBS benefits to low income elderly, blind, physically disabled, developmentally disabled, and mentally ill persons. The HCBS programs were paid for in part by federal funds obtained by the state under Medicaid waivers. *See* Social Security Act § 1915(c)(1), 42 U.S.C. § 1396n(c)(1) (1988). HCBS waivers initially last three years but, upon proper application, may be extended for additional five-year periods. 42 U.S.C. § 1396n(c)(3). In 1985, respondents applied for renewal of Colorado's 1982 HCBS waivers. The federal government renewed the HCBS waivers for the state's elderly, blind, and disabled HCBS programs, but did not renew the waiver for the state's mentally ill program. As a result, respondents stopped providing HCBS benefits to mentally ill persons, but continued HCBS benefits for elderly, blind, and disabled persons.[3]

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[3]Currently, Colorado has HCBS waivers to provide: (1) aged and disabled persons with case management, personal care, homemaker, adult day care, respite, transportation, minor home modifications, and electronic monitoring and communications devices; (2) mentally retarded and developmentally disabled persons with personal care, respite care, transportation, residential services, case management, and habilitation services; (3) inappropriately placed developmentally disabled individuals with

Petitioner claimed that he was deprived of HCBS benefits in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and section 504 of the Rehabilitation Act of 1973 and sought injunctive relief to prevent the denial of HCBS benefits to himself and the class. In a "decision and order" dated August 23, 1990, the trial court ruled in favor of the petitioner on both claims and ordered respondents to provide HCBS benefits to the class "[s]o long as [respondents] provide HCBS benefits to elderly, blind and physically disabled persons." Respondents appealed and we granted certiorari before judgment pursuant to C.A.R. 50 to determine whether the Equal Protection Clause or section 504 forbids Colorado from offering HCBS benefits to elderly, blind, and disabled persons without offering precisely the same services to mentally ill persons. We also granted certiorari to determine whether there is a basis for imposing liability on respondent Henry Solano, Director of the Colorado Department of Institutions since he did not provide HCBS services to physically disabled persons. We reverse the judgment of the trial court and hold that respondents did not violate the Equal Protection Clause or section 504 by refusing to provide HCBS benefits for the members of the class of low income mentally ill persons. Our resolution of the first issue eliminates the need to address the potential liability of the respondent Solano.

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case management, residential habilitation, transportation, day habilitation, and respite; and (4) individuals diagnosed as having AIDS (Acquired Immunodeficiency Syndrome) or ARC (AIDS-Related Complex) with case management, personal care/homemaker, adult day care, home health care, private duty nursing, and intensive supervision of foster care children with AIDS or ARC. 3 Medicare & Medicaid Guide (CCH) ¶ 14,625, at 6341.

I

The Stipulated Facts

Section 1915(c) of the Social Security Act authorizes states to provide HCBS programs for elderly, blind, and physically disabled persons; developmentally disabled persons; and mentally ill persons. The parties stipulated that the provision was meant to prevent the unnecessary institutionalization of those persons, contain costs of long-term nursing home care for them, and provide them with more appropriate community-based services. The HCBS programs are jointly funded by the federal and state governments. Federal financial assistance under Medicaid covers between fifty and seventy-five percent of the cost of the HCBS programs. The federal government reimburses the state under an HCBS "waiver" obtained under section 1915(c) of the Social Security Act.[4] To receive an HCBS waiver, the state must demonstrate that the individual HCBS program is "cost effective." To be cost effective, an HCBS program must cost less per eligible individual than would Medicaid reimbursed nursing home care.[5]

In 1982, Colorado obtained HCBS waivers for elderly, blind, physically disabled, developmentally disabled, and mentally ill persons. In 1985, Colorado applied for an extension of the HCBS waiver program for mentally ill persons, but the application was

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[4]The federal reimbursement is referred to as a waiver because the federal government may waive three requirements applicable to other Medicaid programs: statewideness, comparability, and community income and resource rules. *See* 42 U.S.C. § 1396n(c)(3) (1988).

[5]The statute states that the estimated average per capita expenditure under the HCBS program must "not exceed" the estimated average or per capita expenditure under the state plan for the same year if the waiver had not been granted. 42 U.S.C. §1396n(c)(2)(D).

denied by the Health Care Financing Administration of the Department of Health and Human Services. The Administrator stated that regional investigators had determined that a majority of Colorado's mentally ill HCBS recipients were not eligible for Medicaid because, absent the waiver, they would be patients in mental institutions. *See* Social Security Act § 1905(a), 42 U.S.C. § 1396d(a) (Medicaid does not include payments for care or services for an individual between twenty-one and sixty-five years of age who is a patient in an institution for mental diseases). The Administrator, in a letter to the Colorado Department of Social Services, which is incorporated by reference in the stipulations, stated that Colorado had attempted to circumvent federal HCBS requirements by holding patients released from mental institutions for fifteen days before placing them in the HCBS waiver program for the mentally ill. The state's "holding" procedure was insufficient to make the individuals eligible for Medicaid benefits. The Administrator also noted several problems with Colorado's cost effectiveness calculations. The Colorado Department of Institutions decided not to submit a revised application and terminated the mentally ill HCBS program. It continued to operate HCBS programs for elderly, blind, and disabled persons under renewal waivers it obtained for these programs.

The parties stipulated that HCBS services would greatly benefit the class.[6] The Executive Director of the Colorado Department of Social Services referred to the HCBS services as essential to (1) the care and treatment of the long-term mentally ill population, and (2) the cost containment of nursing care for that population. No existing state program provides the class with the HCBS program services that are currently provided to elderly, blind, and physically disabled persons. The stipulation also provided that the class has been and

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[6]The services provided under the existing HCBS programs include: home health care; personal hygiene; dressing; preparation of meals; nonmedical transportation; home modification and monitoring; case management; adult day care; and instruction in self care, independent living, and nutrition.

will be denied HCBS services solely because their primary diagnosis is mental illness. At the time of the stipulation, 635 persons with a primary diagnosis of mental illness were living in Medicaid-certified nursing homes in Colorado.

Colorado law previously required respondents to seek HCBS waivers for the mentally ill and developmentally disabled. *See* Home and Community-based Services for Mentally Ill Persons and Persons with Developmental Disabilities Act, §§ 26-4.5-201 to -212, 11B C.R.S. (1989) (current version at §§ 26-4-621 to -647 (1991) (Home and Community-based Services for Persons with Developmental Disabilities Act)).[7] In 1991, the General Assembly repealed the

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[7]The legislative purposes of the Home and Community-based Services for Mentally Ill Persons and Persons with Developmental Disabilities Act were as follows:

> (1) The general assembly hereby finds and declares that it is the purpose of this article to provide services for the developmentally disabled and the mentally ill which would foster the following goals:
>
> (a) To maintain eligible persons in the most appropriate settings possible and to minimize admissions to institutions;
>
> (b) To recognize the unique services requirements of the mentally ill and the developmentally disabled;
>
> (c) To provide optimum accessibility to various important social, habilitative, remedial, residential, and health services that are available to assist in maintaining eligible persons in the least restrictive settings;
>
> (d) To provide that eligible persons who have the capacity to remain outside an insti-

statutory language that authorized respondents to seek an HCBS waiver for mentally ill persons.[8] *See* Home and Community-based Services for Persons with Developmental Disabilities Act, ch. 217, secs. 1-8, §§ 26-4.5-201 to -209, 1990 Colo. Sess. Laws 1380-82 (current version at §§ 26-4-621 to -631, 11B C.R.S. (1991 Supp.)). The new statute states:

> It is the intent of the general assembly to provide cost-effective services in the least restrictive setting to individuals who are mentally ill. It is from that

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> tutional setting have access to appropriate social, habilitative, remedial, residential, and health services, without which institutionalization would be necessary;
>
> (e) To provide the most efficient and effective use of funds in the delivery of these social, habilitative, remedial, residential, and health services to eligible persons;
>
> (f) To coordinate, integrate, and link these social, habilitative, remedial, residential, and health services into existing community-based service delivery systems for the developmentally disabled and the mentally ill, to avoid unnecessary and expensive duplication of services;
>
> (g) To allow the state substantial flexibility in organizing and administering the delivery of social, habilitative, remedial, residential, and health services to eligible citizens.

§ 26-4.5-202(1), 11B C.R.S. (1989).

[8]The respondents in this case drafted the repealing legislation.

> philosophy that the general assembly authorized and the state implemented a home and community-based services program under the auspices of a federal medicaid waiver. *Inasmuch as the federal government has been unwilling to continue Colorado's waiver for mentally ill persons, the enabling state statutory provisions for that medicaid funded program are hereby removed.* However, the general assembly has an ongoing interest in examining the needs of those who are in need of long-term care because of their mental illness and in the most cost-effective mental health and supportive services as may be necessary to allow the greatest degree of independence. In furtherance of this intent, the department of institutions is charged to report to the general assembly on or before January 1, 1991, on any additional statutory, budget, or administrative modifications that will facilitate the goal of home and community-based care for the mentally ill.

§ 26-4-622(1) (emphasis added). The remainder of the new statute retains the same purposes and provisions as before, but is limited to developmentally disabled persons. The state is also required by statute to seek an HCBS waiver for elderly, blind, and disabled persons. *See* §§ 26-4-601 to -612.

The parties stipulated that the United States Department of Health and Human Services' position on Colorado's ability to obtain an HCBS waiver for the mentally ill was set forth in a May 17, 1990,

letter from the Administrator to United States Representative Patricia Schroeder. The Administrator stated that the federal statutes did not prohibit the mentally ill from obtaining HCBS benefits. He explained, however, that other provisions of the Medicaid statute limit the availability of HCBS benefits for the mentally ill. Under section 1905(a), Medicaid is not available for individuals between twenty-one and sixty-five who are inpatients in mental institutions. Most of the recipients of the benefits under Colorado's HCBS program for mentally ill persons were previously inpatients in mental institutions and, as such, were not receiving Medicaid benefits prior to entry into the HCBS program. An HCBS program that included these individuals, therefore, would not be budget neutral. The Administrator stated that the Health Care Financing Administration applies the same standards to waivers for the mentally ill that it does on all other waivers.[9] He said, "If Colorado wishes to request a[n HCBS waiver] for the mentally ill, it must show that its proposal meets the statutory requirements, including a showing of budget neutrality." The Administrator noted that at that time only Vermont had an operational HCBS waiver for the mentally ill.

Finally, the parties stipulated that petitioner and the class members are protected handicapped persons within the meaning of section 504 of the Rehabilitation Act of 1973.

The Trial Court Order

The trial court heard testimony from three local HCBS providers and the Assistant Director of the Division of Mental Health of the Colorado Department of Institutions, who prepared the 1985 HCBS waiver application for the mentally ill. The trial court incorporated the stipulated facts into its findings and made the

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[9]However, the Medicaid limitation for the twenty-one to sixty-five year old age group does not apply to individuals institutionalized in other facilities.

following additional findings based on the testimony. First, the trial court found that an HCBS program similar to the one provided for elderly, blind, and disabled persons was "necessary to maintain [petitioner] and class members in stable condition in the community, and to avoid institutionalization of such persons in hospitals and nursing homes." Second, without HCBS benefits, the class "will continue to experience the revolving door syndrome of hospitalization, nursing home placement, placement in the community, de-stabilization and re-hospitalization." Third, the state "failed to exercise reasonable diligence to seek out federal financial assistance, which is currently available" because it made no attempts to correct and resubmit its rejected 1985 waiver application or to challenge the rejection. Fourth, the cost burden of providing HCBS benefits to the mentally ill is insignificant in light of the benefits to the class ($46 per day for HCBS benefits prevents hospitalization at a rate of $400 per day). Fifth, there are sufficient funds to provide HCBS benefits to the class because the state is not utilizing all the funds allotted to the HCBS programs for the elderly, blind, and disabled. Finally, the trial court found that the petitioner and the class members meet all the medical and financial qualifications for HCBS benefits and are, therefore, "otherwise qualified handicapped persons" within the meaning of section 504 of the Rehabilitation Act of 1973.

The trial court determined that section 1915(c) of the Social Security Act "establishes a single, unified HCBS waiver program for all otherwise eligible persons who, without the provision of such services, would require hospitalization, or skilled or intermediate nursing home care." Section 1915(c) states that it establishes the waiver program for approved state HCBS plans of

> care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or nursing facility or intermediate care facility for

> the mentally retarded the cost of which could be reimbursed under the State plan.

42 U.S.C. § 1396n(c)(1). The trial court found that petitioner and the class were such individuals and, therefore, could not "be excluded from receiving HCBS program services solely by reason of their disability." The trial court also rejected respondents' contention that mentally ill persons could be denied HCBS services on the basis of "scarce public dollars" because it found that federal funds were equally available for the mentally ill HCBS program as for the other HCBS programs.

Applying strict scrutiny and rational basis review, the trial court found that respondents failed to show either a compelling or a legitimate governmental interest for the denial of HCBS benefits to mentally ill persons. It stated that petitioner and the class "are entitled to meaningful access to the same HCBS programs which are currently provided to elderly, blind, and physically disabled persons." The trial court concluded that respondents discriminated against petitioner and the class in violation of the Equal Protection Clause of the United States Constitution and section 504 of the Rehabilitation Act of 1973. *See* 45 C.F.R. § 84.4 (1991).[10] Consequently, the

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[10]45 C.F.R. § 84.4 provides, in relevant part:

> (a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.
>
> (b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through

contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

....

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service.

(2) For purposes of this part, aids,

trial court enjoined respondents from basing any denial of HCBS benefits to the class on the ground that their primary diagnosis was mental illness. The trial court ordered that so long as respondents provide HCBS benefits to elderly, blind, and physically disabled persons, respondents must provide the same benefits to petitioner and

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> benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.
>
> (3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.
>
> (4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

the class members.[11]

II

The Federal HCBS Medicaid Waiver

Before 1981, Medicaid provided little coverage for long-term noninstitutional care, but offered full or partial coverage for similar care in an institution. [1981-1982 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 31,532, at 9603-04. Many elderly, disabled, and chronically ill people lived in institutions, not to receive medical care, but to receive home health care and social services that they were unable to pay for without Medicaid coverage. *Id.* at 9604. To remedy the situation, Congress enacted section 1915(c) of the Social Security Act 42 U.S.C. § 1396n(c) (1988) (current version at 42 U.S.C.A. § 1396n(c) (West 1992)), which authorized the Secretary of the Department of Health and Human Services to waive certain Medicaid statutory limitations,[12] so that a state could be reimbursed for providing a broad array of home and community-based services to individuals who would otherwise require the level of care provided in a hospital, nursing, or intermediate care facility.

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[11]The trial court rejected respondent Henry Solano's contention that he was not responsible for providing HCBS benefits to mentally ill persons.

[12]Section 1915(c)(3) of the Social Security Act provides in part:

> A waiver granted under this subsection may include a waiver of the requirements of section 1396a(a)(1) of this title (relating to *statewideness*), section 1396a(a)(10)(B) of this title (relating to *comparability*), and section 1396a(a)(10)(C)(i)(III) of this title (relating to *income and resource rules applicable in the community*).

42 U.S.C. § 1396n(c)(3) (emphasis added).

Social Security Act § 1915(c)(1), 42 U.S.C. § 1396n(c)(1).[13]

The Medicaid statutes and regulations allow states to target eligible population groups. The Health Care Financing Administration described the flexibility of state HCBS programs under a section 1915(c) waiver in the following manner:

> Under the waiver, home and community-based services do not have to be provided throughout the State. Also, a State can choose to provide home and community based services to a limited group of eligibles, such as the developmentally disabled. The State is not required to provide the services to all eligible individuals who require an

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[13]Section 1915(c)(1) of the Act provided:

> The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home and community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan.

42 U.S.C. § 1396n(c)(1).

> [intermediate care facility] or [skilled nursing facility] level of care.

[1985 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,532, at 9588. Thus, a state may target patients in a class defined by a specific illness or disability. 42 U.S.C. § 1396n(c)(7)(A);[14] *Beckwith v. Kizer*, 912 F.2d 1139, 1140 (9th Cir. 1990). However, a request for a waiver must be limited to one of three target groups or any state-defined subgroup: (1) aged or disabled, or both; (2) mentally retarded or developmentally disabled, or both; or (3) mentally ill. 42 C.F.R. § 441.301(b)(6) (1990).

Before the federal government will grant a waiver, the state must assure and convince the Department of Health and Human Services that: (1) it will protect the health and welfare of individuals provided services under the waiver and will be financially accountable for the funds expended; (2) it will evaluate the need for inpatient services in hospitals, nursing facilities, and intermediate care facilities

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[14]Section 1915(c)(7)(A) of the Act provides:

> In making estimates under paragraph (2)(D) [relating to cost effectiveness] in the case of a waiver that applies only to individuals with a particular illness or condition who are inpatients in, or who would require the level of care provided in, hospitals, nursing facilities, or intermediate care facilities for the mentally retarded, the State may determine the average per capita expenditure that would have been made in a fiscal year for those individuals under the State plan separately from the expenditures for other individuals who are inpatients in, or who would require the level of care provided in, those respective facilities.

42 U.S.C. § 1396n(c)(7)(A).

for the mentally retarded; (3) it will inform individuals who are likely to need the level of care provided in a hospital, skilled nursing facility, or intermediate care facility of available feasible alternatives and will allow the individuals to choose the method of care; (4) it will be able to prove by estimation that the yearly average per capita expenditure for an HCBS waiver program does not exceed the average per capita expenditure if the waiver had not been granted; and (5) it will provide yearly data on the impact of the waiver. 42 U.S.C. § 1396n(c)(2)(A)-(E). Regulations describing the Health Care Financing Administration waiver requirements relating to the state assurances are provided at 42 C.F.R. § 441.302 (1990). The federal government uses a complex formula involving fourteen variables to assure the federal government that a proposed HCBS program will be cost effective. *See* 42 C.F.R. § 441.303. In addition, the Health Care Financing Administration publishes guidelines for obtaining an HCBS waiver. *See State Medicaid Manual*, HCFA-Pub. 45-4, §§ 4440-4446 (Sept. 1988 & Aug. 1991), *reprinted in* 3 Medicare & Medicaid Guide (CCH) ¶ 14,625, at 6328-40; *State Medicaid Manual*, HCFA-Pub. 45-2, § 2110 (Sept. 1989), *reprinted in* 3 Medicare & Medicaid Guide (CCH) ¶ 14,625, at 6324.

The trial court arrived at two legal conclusions that are not supportable in light of the federal statutes and their attendant regulations and guidelines. First, the trial court concluded,

> This statute [Social Security Act § 1915(c)(1), 42 U.S.C. § 1396n(c)(1)] does not limit participation in the HCBS waiver program to any specific category of persons who would otherwise be institutionalized. Indeed, there is no provision in the statute which authorizes states to offer HCBS programs for the elderly, blind and physically disabled while discriminating against eligible mentally ill persons solely on the basis

> of the nature of their disability. To the contrary, *the statute establishes a single, unified HCBS waiver program* for all otherwise eligible persons who, without the provision of such services, would require hospitalization, or skilled or intermediate nursing home care.

(Emphasis added.) We disagree.

Section 1915(c)(7)(A) of the Social Security Act contemplates that cost effectiveness calculations will be made for waivers that apply to "individuals with a particular illness." 42 U.S.C. § 1396n(c)(7)(A). Similarly, the implementing regulations require a separate waiver application for the mentally ill. *See* 42 C.F.R. § 441.301(b)(6). The Medicaid HCBS waiver plan, when viewed in its entirety, provides an incentive, by way of financial assistance and waived general requirements, for states to create flexible HCBS programs for discrete target groups.

Second, because federal financial assistance is available to provide HCBS benefits to the mentally ill, and because the Health Care Financing Administration applies the same standards to mentally ill HCBS waivers that it applies to all other requests, the trial court concluded, "federal funds are equally available for HCBS programs for the mentally ill as for HCBS programs for the elderly, blind and physically disabled." We do not agree that the existence of funds and similar application requirements compel such a conclusion. The application process is complex and requires many calculations specific to each target group. On the record before us it is impossible to determine whether respondents would, upon reapplication, be able to obtain a section 1915(c) waiver for the mentally ill, in general, or for the specific class in issue. Moreover, although many states have HCBS waivers for the mentally retarded and developmentally disabled, no state currently has an HCBS waiver for the mentally ill. *See* 3 Medicare & Medicaid Guide (CCH) ¶ 14,625, at 6340 to 6349-

3. Consequently, the trial court's conclusion that federal funds are equally available for the mentally ill is unsupportable. The record merely shows that federal funds, regardless of the target group, are evaluated under the same criteria, and that Colorado's application for a waiver was denied in 1985.

III

The Colorado HCBS Statute

The federal HCBS waiver statute and regulations do not require a state to institute HCBS programs as part of a state Medicaid plan. However, respondents were required by state statute to provide HCBS benefits to the mentally ill as well as the developmentally disabled. *See* §§ 26-4.5-201 to -212, 11B C.R.S. (1989). In May 1990, three months before the district court order, the act was amended and the mentally ill were excluded. *See* Home Community-based Services for Persons with Developmental Disabilities Act, ch. 217, 1990 Colo. Sess. Laws 1380-82 (currently codified at §§ 26-4-621 to -631, 11B C.R.S. (1991 Supp.)). The current statute does not require respondents to provide HCBS benefits to the mentally ill and, therefore, cannot be the basis of injunctive relief requiring the provision of HCBS benefits to the class.

Under the prior statute, respondents were to use a variety of funding sources for HCBS mentally ill programs, including federal financial assistance under Medicaid. § 26-4.5-204(1)(a), 11B C.R.S. (1989). However, HCBS benefits were to be provided to eligible mentally ill persons "[s]ubject to the availability of federal financial participation." § 26-4.5-208(1), 11B C.R.S. (1989).

IV

Equal Protection

Petitioner and the class contend that their rights to equal protection under the Fourteenth Amendment of the United States Constitution were violated by respondents' denial of HCBS benefits. They contend that mentally ill persons are a suspect class and, therefore, that the state's unequal treatment must be subjected to strict scrutiny. Petitioner and the class contend that strict scrutiny is also proper because they have a fundamental liberty interest in being free from the undue bodily restraint inherent in institutionalization. Alternatively, petitioner and the class contend that the denial of HCBS benefits is not rationally related to any legitimate government interest. We disagree.

The rational basis test is the proper standard for review because mentally ill persons are neither a suspect nor a quasi-suspect class and petitioners and the class do not have a fundamental right to receive HCBS benefits. Furthermore, petitioners have not met their burden of showing that respondents lacked a rational basis for discontinuing the HCBS program for the mentally ill.

In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985), the Supreme Court held that mental retardation is not a suspect or quasi-suspect classification for the purposes of equal protection review. Consequently, legislative decisions relating to mentally retarded persons will be upheld so long as the classification is rationally related to a legitimate state interest. *Id.*; *see State v. DeFoor*, No. 90SA351, slip op. at 10 (Colo. Feb. 3, 1992). The Court in *Cleburne* reasoned that, "where individuals in the group affected by law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant ... to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." 473 U.S.

at 441-42. Mental retardation differs from classifications requiring enhanced scrutiny because a state has a legitimate interest in treating mentally retarded persons differently due to their "reduced ability to cope with and function in the everyday world." *Id.* at 442. Requiring a state to justify its legislation under a heightened scrutiny standard may result in less beneficial legislation for the mentally retarded. *Id.* at 444.

The *Cleburne* analysis applies equally to persons suffering from mental illness. Mentally ill persons, to varying degrees, also may have a reduced ability to cope and function in the everyday world.[15] Recognizing this, the General Assembly has sought to enact legislation beneficial to, rather than harmful to, the mentally ill. *See* Care and Treatment of the Mentally Ill Act, §§ 27-10-101 to -129, 11B C.R.S. (1989 & 1991 Supp.). Indeed, the Court in *Cleburne* indicated that the mentally ill are similarly situated, for equal protection purposes, to the mentally retarded, who it declined to qualify as a suspect or quasi-suspect class:

> [I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least

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[15]The General Assembly has defined a "mentally ill person" as "a person with a substantial disorder of the cognitive, volitional, or emotional processes that grossly impairs judgment or capacity to recognize reality or to control behavior." § 27-10-102(7), 11B C.R.S. (1989).

> part of the public at large. One need mention in this respect only the aging, the disabled, *the mentally ill*, and the infirm. We are reluctant to set out on that course, and we decline to do so.

473 U.S. at 445-46 (emphasis added).

Petitioners claim that the mentally ill are a suspect class as a result of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (codified at 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991)), which states:

> The Congress finds that ... individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society....

42 U.S.C.A. § 12101(a)(7). The Americans with Disabilities Act is not applicable here because this case was not brought under that Act and that Act was not in effect at the time of trial.

To declare the mentally ill to be a suspect or quasi-suspect class would be contrary to previous decisions of the United States Supreme Court that have interpreted the Equal Protection Clause of the United States Constitution. The Supreme Court has thus far set out only

three categories which it terms suspect classes: race, alienage, and national origin. 473 U.S. at 440. Classifications based on those factors are subjected to strict scrutiny because those "factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy ... and because such discrimination is unlikely to be soon rectified by legislative means." *Id.* The Court identified classifications based on gender and illegitimacy as quasi-suspect and deserving of an intermediate standard of review. *Id.* at 440-41. It distinguished classifications based on age and mental retardation on the ground that individuals in those groups "have distinguishing characteristics relevant to interests the State has the authority to implement." *Id.* at 441. The Court stated that "[i]n such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id.* at 442. Thus, the rational basis test is appropriate here unless petitioner can demonstrate that he is being deprived of a fundamental right. *See Colorado Dept. of Social Servs. v. Board of County Comm'rs*, 697 P.2d 1, 13 (Colo. 1985); *see also Shapiro v. Thompson*, 394 U.S. 618 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

Dandridge v. Williams, 397 U.S. 471, 484-85 (1970), stated that while public welfare assistance "involves the most basic economic needs of impoverished human beings," it is not a fundamental right. Respondents do not have a duty to provide services to prevent the institutionalization of petitioner or the class. The provision of services requested here is distinguished from the infringement on liberty involved in the commitment of a person to an institution, *see People v. Stevens*, 761 P.2d 768 (Colo. 1988), or the deprivation of services to persons so confined, *see Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, the Court determined that the state had a duty to provide certain services to an institutionalized individual, but stated, "As a general matter, a State is under no constitutional duty to provide substantive services for those within its borders." *Id.* at 313.

Since mental illness is not a suspect or quasi-suspect classification and no fundamental interest is involved, the classification here is subject to rational basis review. Under rational basis review, we must uphold a classification if it is rationally related to a legitimate governmental interest. 473 U.S. at 446. The trial court determined that respondents did not show that the classification based on mental illness was rationally related to a legitimate governmental interest. In so concluding, the trial court erroneously placed the burden on the respondents. The burden to prove "beyond a reasonable doubt that the classification is not rationally related to a legitimate state objective" properly lies with the party challenging the constitutionality of the classification. *See Parrish v. Lamm*, 758 P.2d 1356, 1370 (Colo. 1988). We find that petitioner and the class did not meet their burden.

Petitioner has not shown that respondents lacked a rational basis for their 1985 decision not to reapply for an HCBS waiver for the mentally ill. At that time, only Vermont had a waiver for the mentally ill. According to the testimony of the Assistant Director of the Division of Mental Health of the Colorado Department of Institutions, who prepared the 1985 application, the cost of reapplication was approximately $30,000. The Assistant Director testified that a federal official said that Colorado had little chance of receiving an HCBS waiver for the twenty-two to sixty-four-year-old mentally ill population. *See Beckwith v. Kizer*, 912 F.2d 1139, 1144 (9th Cir. 1990) ("Definition of any waiver class necessarily involves difficult policy judgments concerning where the services would most efficiently be used."). Due to the cost of reapplication and the slight chance of obtaining a waiver, it was not irrational for respondents to make a policy judgment to discontinue the HCBS program for the mentally ill and the petitioner has not proven an equal protection violation.

V

Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), provides in relevant part:

> No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....

The parties here stipulated that petitioner and the class are "otherwise qualified handicapped individuals" who were denied the benefits of the HCBS program solely because they are mentally ill. Thus, we need not address these elements and we deal only with the last requirement: Section 504 applies only for programs receiving federal funds. The Supreme Court said:

> Congress limited the scope of § 504 to those who actually "receive" federal financial assistance because it sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds. "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds." ... Under ...

> § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.... By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds.

United States Dep't of Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 605-06 (1986).[16]

Respondents did not make the decision to receive federal funds for the HCBS program for the mentally ill and, therefore, were not in a position to accept or reject the obligations of section 504. Under section 1915(c) of the Social Security Act, states must apply individually for HCBS program waivers for each of the following target groups or subgroups thereof:

> (i) Aged or disabled, or both.
> (ii) Mentally retarded or

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[16]*Paralyzed Veterans* held that section 504 "applies only to those commercial airlines receiving direct federal subsidies." *Tallarico v. TransWorld Airlines*, 881 F.2d 566, 570 (8th Cir. 1989). Concerned about the practical effect on handicapped air travelers, "Congress amended the Federal Aviation Act of 1958 to specifically prohibit discrimination against otherwise qualified handicapped individuals." *Id.; Anderson v. US Air, Inc.*, 818 F.2d 49, 53 (D.C. Cir. 1987); *see* Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (1986). However, the Supreme Court's interpretation of section 504 of the Rehabilitation Act was not affected by the statutory amendment of the Air Carrier Access Act.

developmentally disabled, or both.

(iii) Mentally ill.

42 C.F.R. § 441.301 (1990). The HCBS waiver program is thus divided into at least three different programs. Although respondents receive federal funds for other HCBS programs, the HCBS program for the mentally ill has not received federal funds since 1985. That year respondents applied for and were denied an HCBS waiver for the target group of mentally ill persons. Respondents discontinued the HCBS program for the mentally ill only after the federal government denied funding for the program. Therefore, under the Supreme Court's reasoning in *Paralyzed Veterans,* since respondents did not accept funds for an HCBS program for the mentally ill, the nondiscrimination provision of section 504 was not triggered. Moreover, the 1990 amendment of Colorado's home and community-based services statutes eliminated the enabling statutory provisions for the Medicaid-funded HCBS program for the mentally ill.

We hold that section 504 is not applicable here because the HCBS waiver program at issue does not receive federal funds. Therefore, respondents did not violate section 504 in denying HCBS benefits to petitioner and the class.

VI

We conclude that the respondents did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), by denying HCBS benefits to the petitioner and the class. We, therefore, reverse the trial court judgment requiring respondents to provide HCBS benefits to the petitioner and the class members. Since we reverse the trial court judgment, it is unnecessary for us to address whether respondent Solano should be dismissed from this class action.

JUSTICE QUINN dissents and JUSTICE LOHR joins in dissent.

Duc Van Le v. Ibarra, No. 91SC189

JUSTICE QUINN dissenting:

"'The moral test of government is how it treats those who are in the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadows of life, the sick, the needy, and the handicapped.'" *Arnold v. Dep't of Health Services*, 775 P.2d 521, 537 (Ariz. 1989) (quoting Hubert H. Humphrey). The mentally ill certainly fall within the latter category.

The majority's rejection of Duc Van Le's and the class members' challenge to the state's denial of Home and Community-based Services (HCBS) to low-income mentally ill persons who qualify for skilled or intermediate care under the Social Security Act, 42 U.S.C. § 1396 et. seq. (1988), fosters the perpetuation of a substantial underclass of mentally ill citizens whose continued state of dependency is caused by governmental indifference to or neglect of basic human needs. Because I cannot square the state's action in this case with either the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or with section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), I dissent.

I.

The purpose of the Medicaid Assistance Program, authorized by Title XIX of the Social Security Act, is to enable each state, as far as practicable, to furnish medical assistance to families with dependent children and to the aged, blind, or disabled whose income or resources are insufficient to meet the costs of necessary medical services and to help such families and individuals to attain or retain a capacity for independence or self care. 42 U.S.C. § 1396 (1988). The Medicaid program is jointly financed by the federal and state governments and is administered by the state. "Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services and administrative and operating

procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services." 42 CFR § 430.0 (1991).

As part of the Medicaid program, the federal government pays a portion of the costs of twenty-one categories of services including, but not limited to, inpatient hospital services other than services in an institution for mental diseases,[1] outpatient hospital services, nursing facility services for individuals twenty-one years or older other than services in an institution for mental diseases, other medical care recognized by state law, home health care services, private duty nursing services, services in an intermediate care facility for the mentally retarded other than in an institution for mental diseases, and case-management services. 42 U.S.C. § 1396(d) (1988). Medicaid benefits thus are available for mentally ill persons who receive some level of health-care services at facilities other than institutions for mental diseases. *See Connecticut Dept. of Income Maintenance v. Heckler,* 471 U.S. 524, 529 (1984) (noting that Congress chose to exclude institutions for mental diseases from Medicaid reimbursement because these facilities were already being funded by the state).

In order to encourage flexibility in Medicaid services, the federal statutory scheme permits states to apply for waivers of administrative requirements for federal financing of a state's Medicaid program. 42 U.S.C. § 1396n(b) (1988). These waivers are intended to enable states to try new or different approaches to the efficient and cost-effective delivery of health care services, to adapt the programs to the special needs of particular areas or groups of recipients, and to permit states to implement innovative programs or activities on a

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[1]An institution for mental diseases means "a hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services." 42 U.S.C. § 1396d(i) (1988).

time-limited basis, subject to specific safeguards for the protection of recipients in the program. 42 CFR § 430.25(b) (1991). Under the waiver provisions, the federal government funds the cost of all or part of HCBS benefits to those persons who but for the HCBS benefits would require more expensive health care in a hospital or other health care facility. The cost of providing services pursuant to the waiver thus must be less than the cost of providing the same services absent the waiver. The HCBS program, therefore, provides an alternative method of delivering health-care assistance by allowing qualified persons to receive nursing care in their own homes and thus avoid hospitalization or institutionalization as long as the cost of the HCBS benefits is less than the cost of hospitalization or institutionalization.

The Colorado General Assembly in 1980 passed the "Home and Community-Based Services and Home Health Act," § 26-4.5-101 to -116, 11B C.R.S. (1989), in order to allow the Department of Social Services and the Department of Institutions to administer HCBS benefits funded by the Medicaid Assistance Program. Part two of the statute, which is entitled "Home and Community-Based Services for Mentally Ill Persons and Persons with Developmental Disabilities Act," §§ 26-4.5-201 to -212, 11B C.R.S. (1989), was intended to provide services to mentally ill persons and persons with developmental disabilities in order to accomplish the following goals:

> (a) To maintain eligible persons in the most appropriate settings possible to minimize admissions to institutions;
>
> (b) To recognize the unique service requirements of the mentally ill and the developmentally disabled;
>
> (c) To provide optimum accessibility to various important social, habilitative, remedial, residential, and health services that are available to assist and maintain

the eligible persons in the least restrictive settings;

(d) To provide that eligible persons who have the capacity to remain outside an institutional setting have access to appropriate social, habilitative, remedial, residential, and health services, without which institutionalization would be necessary;

(e) To provide the most efficient and effective use of funds in the delivery of these social, habilitative, remedial, residential, and health services to eligible persons;

(f) To coordinate, integrate, and link these social, habilitative, remedial, residential, and health services into existing community-based service delivery systems for the developmentally disabled and the mentally ill, to avoid unnecessary and expensive duplication of services;

(g) To allow the state substantial flexibility in organizing and administering the delivery of social, habilitative, remedial, residential, and health services to eligible citizens.[2]

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[2]In 1991 the Home and Community-based Services for Mentally Ill Persons and Persons with Developmental Disabilities Act was repealed and replaced by the "Home and Community-based Services for Persons with Developmental Disabilities Act", § 26-4-622 to -631 11B C.R.S. (1991 Cum. Supp.). The legislative purpose of this new act states in pertinent

§ 26-4.5-202, 11B C.R.S. (1989).

Colorado has participated in the Medicaid waiver program since 1982, and HCBS benefits historically have been provided to the elderly, the blind, the physically disabled, and the developmentally disabled. Colorado also provided HCBS benefits to the mentally ill pursuant to the Medicaid waiver program from 1982 to 1985. The mentally ill included those persons whose need for long term care was

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part:

> It is the intent of the general assembly to provide cost-effective services in the least restrictive setting to individuals who are mentally ill. It is from that philosophy that the general assembly authorized and the state implemented a home and community-based services program under the auspices of a federal Medicaid waiver. Inasmuch as the federal government has been unwilling to continue Colorado's waiver for mentally ill persons, the enabling state statutory provisions for that Medicaid funded program are hereby removed. However, the general assembly has an ongoing interest in examining the needs of those who are in need of long-term health care because of their mental illness and in the most cost-effective mental health and supportive services as may be necessary to allow the greatest degree of independence. In furtherance of this intent, the department of institutions is charged to report to the general assembly on or before January 1, 1991, on any additional statutory, budget, or administrative modifications that will facilitate the goal of home and community-based care for the mentally ill.

§ 26-4-622, 11B C.R.S. (Cum. Supp. 1991). The legislative declaration of purpose then lists the identical goals provided in the repealed statute and quoted in the text above, but omits any reference to mentally ill persons, thereby effectively including only developmentally disabled persons within the scope of the statutory scheme. Because the events and trial of this case preceded the enactment of the 1991 act, the 1991 legislation is without legal significance to the issues raised in this case.

based on the diagnosis of mental disease -- that is, those who are psychiatrically disabled -- but did not include persons suffering from chronic alcoholism, chronic dementia, or organic brain syndrome. HCBS services for the mentally ill included case management, partial care directed to the restoration of living skills, vocational rehabilitation, individual and group therapy, and certain residential services. In 1985, however, the U.S. Department of Health and Human Services denied Colorado's request for a renewed HCBS waiver for the mentally ill for the following reasons, which were set forth in a letter to the Colorado Department of Social Services:

> This is in reference to your request for a home and community-based services waiver as authorized by section 1915(c) of the Social Security Act for mentally ill Medicaid recipients who would otherwise require skilled nursing facility services or intermediate care facility services.
>
> We are sympathetic to and wish to support your desire to find more cost-effective methods of providing and reimbursing for medical assistance. However, we believe that the waiver request does not fully comply with all of the statutory and regulatory requirements necessary for approval. Accordingly, we cannot approve this waiver request under section 1915(c) of the Social Security Act. For your information, we have enclosed a report on those aspects of the waiver request which present the

major barriers to approval.

Colorado took no further steps whatever to develop an acceptable waiver program, and as a result the mentally ill have been deprived of all HCBS benefits since 1985.

In November 1988 Duc Van Le, who suffers from mental illness and was eligible for skilled or intermediate care under Title XIX of the Social Security Act, filed an action on behalf of himself and other similarly situated mentally ill persons. Duc Van Le, as relevant here, claimed that Colorado's failure to provide HCBS benefits to the mentally ill violated the Equal Protection Clause of the United States Constitution and section 504 of the Rehabilitation Act of 1973. The case was tried to the court on stipulated facts and other testimonial evidence. On August 23, 1990, the trial court ruled that Colorado's failure to apply for HCBS benefits for Duc Van Le and the class of similarly situated mentally ill persons violated the Equal Protection Clause of the Fourteenth Amendment and also violated section 504 of the Rehabilitation Act. In support of its legal conclusions, the court made the following critical findings of fact:

> 1. Personal care services, homemaker services, medication monitoring in the home, and non-medical transportation, which are services currently provided under the HCBS Program for the elderly, blind and physically disabled, are services which are necessary to maintain plaintiff and class members in stable condition in the community, and to avoid institutionalization of such persons in hospitals and nursing homes.
>
> 2. No public or private agency currently has a program to provide these essential services to plaintiff and class members, although such services are provided by the Department of Social Services to elderly, blind and physically disabled adults whose incomes and medical needs are virtually identical

with those of plaintiff and class members.

3. Without these home and community based services, plaintiff and class members will continue to experience the revolving door syndrome of hospitalization, nursing home placement, placement in the community, de-stabilization and re-hospitalization. Thus, the availability of HCBS is an essential ingredient of normal living patterns for a substantial number of persons who are mentally ill. The failure to provide such services operates to exclude persons who are mentally ill from living in the community, and to return them to more restrictive environments.

4. The mental health services currently provided through the Mental Health Corporation of Denver (MHCD) and other community mental health centers are not sufficient by themselves to avoid the revolving door of re-institutionalization of chronically mentally ill persons. As an example, there is currently a 200-person waiting list for case management services in the MHCD alone. Even under optimal conditions, case managers, with the existing resources, could only spend, on average, slightly more than one hour per week with chronically mentally ill clients. Such case management services, alone, cannot provide the community supports necessary to avoid re-institutionalization of plaintiff and other mentally ill ... class members.

5. Although the State claims that the federal government will not fund a HCBS waiver for mentally ill persons, the evidence of record shows that the State in the last five years has not applied for such a waiver, has not requested in writing any assistance from the federal government to develop a waiver which would be acceptable under the existing regulations, and has not made any attempts to correct

its rejected 1985 waiver application or to challenge the rejection of that waiver application in 1985.

6. The cost burden to the State of providing HCBS program services to the mentally ill is insignificant in light of the benefits to plaintiff and class members, and the federal government's contribution of between 50% and 75% of the cost. The evidence indicates that provision of such services would prevent unnecessary hospitalizations at a cost of $400.00 per day, as compared to the $46.00 per day average cost of HCBS services.

7. According to the testimony there are currently approximately 300 persons in nursing homes in the Denver metropolitan area alone who have been designated as mentally ill.

8. Many of these persons could live in the community if community supports provided through the HCBS program were made available to them.

9. In addition, there are substantial numbers of class members who are currently residing in the community, either in substandard boarding homes or homeless shelters, who would benefit from home and community based services identical to those that are currently provided to the elderly, blind and physically disabled.

10. Despite these facts, the State of Colorado, through the Department of Institutions and the Department of Social Services, has simply failed to exercise reasonable diligence to seek out federal financial assistance, which is currently available, to provide these home and community based services to plaintiff and class members.

11. As plaintiff and class members meet all of the medical and financial qualifications for the Home and Community Based Services Program currently operated by the State, other than the fact

that they are mentally ill, they are otherwise qualified handicapped person[s] under Section 504 of the Rehabilitation Act of 1973.

12. The evidence of record establishes that plaintiff and class members require the very same home and community based services, which the State currently makes available to the elderly, blind and physically disabled, and that plaintiff and class members are deprived of these services solely by reason of the nature of their disability.

13. The State is currently underspending its authorized funding for home and community based services for the elderly, blind and physically disabled; therefore, there is sufficient funding within the HCBS Program to accommodate the provision of home and community based services to plaintiff and class members.

In my view, the trial court's ruling is in accord with federal equal protection standards applicable to governmental classifications having an adverse impact on the mentally ill and is also in accord with federal statutory law.

II.

The purpose of the Equal Protection Clause is to ensure equality and even-handedness in governmental action. In the absence of a classification burdening a fundamental constitutional right or creating a suspect class, the United States Supreme Court has applied a rational basis standard of review in evaluating governmental action. Under that standard, the Court has often evaluated the constitutional validity of various forms of economic and social classifications by considering whether there is any rationally conceivable set of facts to support the classification. *E.g., Lyng v. Castillo,* 477 U.S. 635, 642-43 (1986); *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 528 (1959); *see* L. Tribe, *American Constitutional Law* § 16-3 (1988).

In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), however, the Court employed a more demanding standard of rationality in evaluating a governmental classification applicable to the mentally retarded. There is no principled reason not to apply the *Cleburne* standard to the mentally ill adversely affected by the governmental conduct at issue here.

In *Cleburne* the Supreme Court reviewed the constitutionality of a zoning ordinance that required a special use permit for group homes for the mentally retarded but did not require a similar permit for a variety of other uses including, but not limited to, hospitals, nursing homes, sanitariums, fraternity and sorority houses, apartment houses, and multiple dwellings. Although declining to attribute suspect-class status to the mentally retarded, the Court stated that a classification adversely affecting the mentally retarded will withstand constitutional scrutiny only if the relationship between the classification and the asserted governmental goal is not so "attenuated as to render the distinction arbitrary or irrational." 473 at 446. That degree of scrutiny, the Court reasoned, "affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner." *Id.* (emphasis added). The Court then proceeded to reject the government's four asserted reasons for treating group homes for the mentally retarded differently from other uses -- i.e., the negative attitude of nearby property owners, the proximity of the facility to a junior high school, its location in a five hundred year flood plain, and the size of the facility -- and concluded that singling out the group homes by requiring a special use permit rested on "an irrational prejudice against the mentally retarded." *Id.* at 450.

I read *Cleburne* to prohibit a state from depriving the mentally ill of essential services made available to other handicapped groups in need of similar services, unless the following conditions exist: first, there must be a demonstrably rational basis in fact -- rather than any "reasonably conceivable" basis in fact -- for the

governmental action; second, there must be a demonstrably rational nexus between the classification and a significant governmental objective; and third, the adverse impact on the mentally ill must be no more than an incidental burden on, and not a total deprivation of, essential services. *See Cleburne,* 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part) (rational-basis test applied by majority is "most assuredly" not the traditional and minimal version of the rational-basis standard); *see generally* M. Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference,* 22 Harv. C.R.-C.L. L. Rev. 111, 116 (1987) (*Cleburne* majority "actually offered a beefed up version" of the rational-basis test). Applying *Cleburne* to this case leads me to conclude that there is no rational reason for the state to refrain from seeking a waiver in order to secure HCBS benefits for the mentally ill. The trial court, faced with the state's claim that federal funding might be difficult to obtain, found as a fact that since 1985 Colorado has not applied for a Medicaid waiver for the mentally ill, has not requested assistance from the federal government to develop an acceptable waiver, and has not attempted in any way to correct its unsuccessful 1985 waiver application. In light of these findings, the state's assertion that federal funding is not available for HCBS benefits for the mentally ill is disingenuous at best. The letter from the U.S. Department of Health denying the state's 1985 renewal application left open the possibility of approval upon full compliance with statutory and regulatory requirements, but the state made no effort to resubmit a curative application.

The majority categorizes the state's decision to discontinue the HCBS program for the mentally ill as a policy decision and, on that account, presumably a matter of governmental discretion entitled to some deference. Maj. op. at 28; *see Beckwith v. Kizer*, 912 F.2d 1139, 1144 (9th Cir. 1990). Governmental discretion in the allocation of benefits to the mentally ill, however, is not the measure of the equal protection guarantee. To be sure, the Medicaid waiver provisions authorize a state to apply for HCBS benefits for distinct

groups -- the aged or disabled, or both; the mentally retarded or developmentally disabled, or both; or the mentally ill. 42 CFR § 441.301 (1991). The fact that the state may apply for an HCBS program waiver for an individual group or subgroup does not constitute a warrant for arbitrary and irrational policy decisions that have the effect of totally depriving an entire class of mentally ill persons of any meaningful access to benefits which the state has chosen to make available to the other groups or subgroups with needs similar to the needs of the deprived class.

The majority also seems to attach constitutional significance to the fact that no other state has a Medicaid waiver program for the mentally ill. *See* maj. op. at 8. The frequency or infrequency of a practice does not determine its validity, since "[i]t is possible for many to commit the same mistake." *Curtis v. Taylor,* 625 F.2d 645, 651 (5th Cir. 1980). Simply put, the motive or intent underlying Colorado's failure to seek a Medicaid waiver for the mentally ill is more a matter of speculation than anything else and certainly does not measure up to the demonstrably rational basis in fact for the state's decision to treat the mentally ill differently from other similarly situated groups of handicapped persons.

Moreover, whatever might be the underlying reason for the state's failure to seek a Medicaid waiver for the mentally ill, there does not appear to me to be any demonstrably rational nexus between the state's inaction and any significant governmental objective. Although the majority attaches constitutional significance to the $30,000 cost of a waiver reapplication, maj. op. at 28, I am at a loss to see any rational link between the reapplication cost and any significant governmental objective to be achieved by excluding the class of the mentally ill from HCBS benefits.

Finally, the state's inaction on this matter causes far more than an "incidental burden" on the mentally ill. The effect of the state's failure to seek a Medicaid waiver totally deprives Duc Van Le and the similarly situated class of mentally ill persons of those

essential HCBS benefits which the state has made available to other handicapped groups in need of similar services. The majority's approval of the state's complete termination of HCBS benefits for the mentally ill regrettably will be viewed by the state as a license to continue a course of discrimination that the Equal Protection Clause was intended to prohibit.

III.

I also dissent from the majority's holding that the anti-discrimination provisions of section 504 of the Federal Rehabilitation [sic] of 1973, 29 U.S.C. § 794 (1988), do not apply to Duc Van Le and similarly situated mentally ill persons because the State of Colorado is not a "recipient" of federal funds for HCBS programs within the intendment of section 504. Section 504 provides in pertinent part that "[n]o otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, and be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...."[3] The federal regulation implementing section 504 defines a recipient as "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient." 45 CFR § 84.3(f) (1991). The federal regulations prohibit a recipient of federal funds

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[3]The federal regulations implementing this statute define a handicapped person as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 45 C.F.R. § 84.3(j) (1991). A mental impairment is further defined as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3(i)(iv)(B) (1991). The parties stipulated that Duc Van Le and the class of low income mentally ill persons fall within the definition of qualified handicapped persons.

from excluding from participation in, and denying the benefit of, or otherwise discriminating against any qualified person on the basis of a handicap. 45 CFR § 84.4(a) (1991). Specifically, a recipient cannot:

> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
>
> (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;
>
> (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;
>
> . . .
>
> (vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

45 CFR § 84.4(b)(1) (1991). Nothing in the federal regulatory scheme justifies exempting Colorado from the federal anti-discrimination requirements solely because the state, although receiving federal funds for other groups of handicapped persons protected against governmental discrimination by section 504, was not federally funded for HCBS programs for the mentally ill. What we

have in this case is state action that has an egregiously adverse impact on the mentally ill by denying them any meaningful access to HCBS benefits available to others under a program funded in whole or in part by the federal government.

In *Alexander v. Choate,* 469 U.S. 287 (1984), the Supreme Court considered whether Tennessee's decision to reduce Medicaid coverage for hospital stays from fourteen to twelve days was a violation of section 504 because the reduction had a disparate discriminatory impact on qualified handicapped persons who spent more time in hospitals than nonhandicapped persons. Faced on the one hand with the state's argument that section 504 reaches only intentional discrimination against the handicapped and on the other with the Medicaid recipients' argument that section 504 proscribes all disparate impact discrimination, the Court "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Id.* at 299. The Court then concluded that "an otherwise qualified handicapped person must be provided with meaningful access to the benefit that the grantee offers," *id.* at 301, and that the benefit itself "cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Id.* at 301. Because the record in *Choate* showed that the reduction in inpatient coverage would leave "both handicapped and nonhandicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation," *id.* at 302, the Court rejected the recipients' claim that Tennessee's action violated section 504.

In contrast to the state action in *Choate*, Colorado's refusal to apply for HCBS benefits for the mentally ill is violative of section 504 because it deprives that class of handicapped persons of any "meaningful access" to the same benefits provided to the elderly, the blind, and the developmentally disabled Medicaid recipients. The trial court's finding that no public or private agency has a program to provide the essential services to Duc Van Le and similarly situated

class members and the trial court's further finding that Duc Van Le and the class members require the very same services as are provided to other handicapped recipients of HCBS benefits leave no doubt, in my mind at least, that the State of Colorado, as a recipient of Medicaid benefits under section 504, has discriminated against the mentally ill in violation of section 504 by totally denying them any meaningful access to the very same HCBS benefits available to other similarly situated classes of handicapped persons.[4]

Just as we are not at liberty to construct subtle arguments for the purpose of avoiding an expansive construction required by the statutory text and purpose, so too are we not at liberty to recast a statute in a manner that narrows its application to the point of eliminating its central core of meaning. The majority errs on both counts by rejecting Duc Van Le's section 504 challenge to what is clearly discriminatory state action against the mentally ill.

I dissent because I believe the trial court correctly held that the state's denial of HCBS benefits to mentally ill persons violates both the Equal Protection Clause of the United States Constitution and section 504 of the Rehabilitation Act of 1973.

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[4]I acknowledge that, based on the waiver provisions which allow the state to be out of compliance with the Medicaid requirements of statewideness, comparability, and community income and resource rules, 42 U.S.C. § 1396n(c)(3) (1988), it can be argued that because the state can discriminate within a class by providing HCBS benefits to persons in one geographical area and not in another, the state can also discriminate between classes by choosing to provide HCBS benefits to the elderly, the blind, the physically disabled, and the developmentally disabled, but not to the mentally ill. The state, however, is justified in making intra-class distinctions on the basis of its authority to provide Medicaid benefits to those most in need. *Martinez v. Ibarra*, 759 F. Supp. 664 (D. Colo. 1991). There is no comparable justification for the state, as a recipient of Medicaid funding, to totally deny an entire class of any meaningful access to HCBS benefits when, as here, the state provides HCBS benefits to the elderly, the blind, and the physically and developmentally disabled.

JUSTICE LOHR joins in this dissent.

APPENDIX C

SUPREME COURT OF COLORADO December 14, 1992
NO. 91SC189

DUC VAN LE, on behalf of himself and the class of persons similarly situated, Petitioner,

v.

IRENE M. IBARRA, in her official capacity as the Executive Director of the COLORADO DEPARTMENT OF SOCIAL SERVICES; HENRY SOLANO, in his official capacity as Executive Director of the COLORADO DEPARTMENT OF INSTITUTIONS; ROBERT BAUSERMAN, ROBBIE L. BEAN, SUSANNE D. DOSH, DENNIS FISHER, MARY KYER, PEGGY STOKSTAD,
JOHN P. STONE, and RICHARD F. WALKER in their official capacities as members of the COLORADO BOARD OF SOCIAL SERVICES, Respondents.

Certiorari to the Colorado Court of Appeals
Pursuant to C.A.R. 50
EN BANC JUDGMENT AFFIRMED BY OPERATION OF LAW

PER CURIAM.

JUSTICE VOLLACK does not participate.

This case has been heard and reviewed by the court. Justice Lohr, Justice Quinn, and Justice Kirshbaum favor affirmance of the judgment of the Denver District Court. *Duc Van Le v. Ibarra*, No. 88CV22641 (Aug. 23, 1990). Chief Justice Rovira, Justice Erickson, and Justice Mullarkey favor reversal. Justice Vollack did not participate.

Accordingly, the judgment of the district court is affirmed by operation of law because of an equally divided court. C.A.R. 35(e).

APPENDIX D

SUPREME COURT, STATE OF COLORADO
CASE NO. 91SC189
Rule 50 Certiorari to the Colorado Court of Appeals 90CA1941

ORDER OF COURT

DUC VAN LE, on behalf of himself and the class of persons similarly situated,
Petitioner,
v.
IRENE M. IBARRA, in her official capacity as the Executive Director of the COLORADO DEPARTMENT OF SOCIAL SERVICES; HENRY SOLANO, in his official capacity as Executive Director of the COLORADO DEPARTMENT OF INSTITUTIONS; ROBERT BAUSERMAN, ROBBIE L. BEAN; SUSANNE D. DOSH; DENNIS FISHER; MARY KYER, PEGGY STOKSTAD; JOHN P. STONE and RICHARD F. WALKER in their official capacities as members of the COLORADO BOARD OF SOCIAL SERVICES,
Respondents.

Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petitions for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 11, 1993.
Chief Justice Rovira, Justice Erickson, and Justice Mullarkey would grant the petitions.

Justice Erickson dissents to the denial of the Petitions for Rehearing.
Justice Vollack does not participate.

Duc Van Le v. Ibarra, No. 91SC189

JUSTICE ERICKSON dissenting to the denial of the petitions for rehearing:

In this class action, the trial court held that the respondents, administrators of state social service programs, violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988) (section 504), and the Fourteenth Amendment to the United States Constitution (Fourteenth Amendment) by failing to provide Duc Van Le and the members of the class of low-income mentally ill persons (petitioners), with the same Home and Community-Based Services (HCBS) program that is provided to elderly, blind, and physically disabled persons. The trial court entered an injunctive order that required the respondents to provide HCBS benefits to the petitioners.[5] The respondents appealed the judgment of the trial

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[5]The trial court's order provides:

> IT IS THEREFORE ORDERED that plaintiff Duc Van Le and members of the class, as previously certified, are entitled to meaningful access to the same HCBS program services which are currently provided to the elderly, blind and physically disabled persons.
>
> IT IS FURTHER ORDERED that:
>
> 1. State defendants, their agents and employees are permanently enjoined from denying plaintiff and class members HCBS benefits solely on the basis that their primary diagnosis is mental illness.

court to the court of appeals and we granted certiorari before judgment.

We were equally divided on the resolution of the issues in this case and the judgment of the trial court was affirmed by operation of law because. *See* C.A.R. 35; *People ex rel. Link v. Tucker*, 96 Colo. 273, 42 P.2d 472 (1934). As a result of the affirmance, the August 23, 1990 trial court order has become the controlling document in this case. The respondents filed petitions for rehearing, which are directed to the trial court's order. In my view, the trial court erred in ordering the respondents to provide HCBS benefits to the petitioners so long as they provided the same benefits to the elderly, blind, and physically disabled. The respondents are allowed to target Medicaid benefits to discrete groups of disabled individuals and because the targeting of Medicaid benefits under an HCBS waiver program does not violate the Fourteenth Amendment.[6] The petition for rehearing submitted by the respondent Colorado Department of Social Services demonstrates that there were, and presently are, no funds appropriated or available for the HCBS services sought by the

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> 2. So long as state defendants provide HCBS benefits to elderly, blind and physically disabled persons, they shall provide the same services for plaintiff and class members.

[6]The imposition of liability on respondent Henry Solano, Director of the Colorado Department of Institutions, based on his failure to provide HCBS services to mentally disabled persons was also affirmed by operation of law. Because I would resolve the section 504 and equal protection issues in favor of the respondents, I perceive no need to address the liability of Solano. I note, however, that there is nothing in the record of this case which supports the trial court's conclusion that Solano or the Department of Institutions ever provided HCBS services to the elderly, blind, or physically disabled. Therefore, I perceive no basis in either fact or law for the trial court's conclusion that Solano is liable to the petitioners or should be enjoined as ordered by the trial court.

mentally ill in this case.[7] I would therefore grant the respondents' petitions for rehearing.

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[7]In fiscal year 1989, the General Assembly appropriated approximately $450 million for Medicaid expenditures, an amount representing 10% of the entire state budget. 1988 Colo. Sess. Laws, ch. 1, Part XXI, pp. 86, 91. In fiscal year 1991, the amount of funds allocated to Medicaid increased to over $665 million, or almost 13% of the state budget. 1990 Colo. Sess. Laws, ch. 1, Part XXI, pp. 83, 88. In the 1992 fiscal year, the amount appropriated to Medicaid expenditures has increased to over $1.1 billion, or almost 18% of the entire state budget. 1991 Colo. Sess. Laws, ch. 340, part XX, pp. 2639, 2648.